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(Slip Opinion)

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**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

_____)
In re:)
)
Essex County (N.J.) Resource)
Recovery Facility) PSD Appeal No. 93-10
_____)

[Decided April 18, 1994]

ORDER DENYING REVIEW

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

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**ESSEX COUNTY (N.J.)
RESOURCE RECOVERY FACILITY**

PSD Appeal No. 93-10

ORDER DENYING REVIEW

Decided April 18, 1994

Syllabus

The Ironbound Committee Against Toxic Waste petitioned for review of a modified Prevention of Significant Deterioration (PSD) permit issued by the New Jersey Department of Environmental Protection and Energy (NJDEPE) to American Ref-Fuel of Essex County (Ref-Fuel). NJDEPE had modified Ref-Fuel's original 1985 PSD permit to require Ref-Fuel to install a selective non-catalytic reduction system, and to source separate bulk yard wastes, when Ref-Fuel advised the State that it would not be able to meet the NO_x emissions limit established in the original permit using "good combustion practices" alone. Ironbound argued in its petition that the source separation condition in the modification permit is insufficient to satisfy BACT for NO_x and that Ref-Fuel should be required to do an analysis of other source separation options. The Board allowed Ref-Fuel to file a response to the petition.

Held: Where, as here, the administrative record contains sufficient data and analysis on various source separation options and source separation of yard wastes was included in the modified permit, to demonstrate that NJDEPE's BACT determination was clearly erroneous, Ironbound had to show that additional categories of source separation would be practicable, taking into account the statutorily prescribed considerations, and would contribute materially to reduction of NO_x emissions. Since Ironbound did not meet that burden, its petition is denied.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

Opinion of the Board by Judge Firestone:

In a petition dated August 9, 1993, the Ironbound Committee Against Toxic Waste ("Ironbound"), a citizens organization, seeks review of a modified Prevention of Significant Deterioration ("PSD") permit issued by the New Jersey Department of Environmental Protection and Energy ("NJDEPE") to the American Ref-Fuel Company of Essex County ("Ref-Fuel"),¹ pursuant to a delegation of authority from U.S. EPA Region II.² NJDEPE issued the initial PSD permit for the construction and operation of a resource recovery facility in Essex County, New Jersey in December 1985.³ Prior to completing construction of the Essex County facility, Ref-Fuel notified NJDEPE in September 1990, that the facility would not be able to achieve the 95 lbs per hour emission limit set for nitrogen oxides ("NO_x") without using additional controls beyond "good combustion practices," the control methodology for NO_x emissions provided for in the permit.

¹ Ironbound also challenged the original 1985 PSD permit, but on grounds that are not relevant to this appeal. See *In re American Ref-Fuel Company of Essex County*, PSD Appeal No. 86-1 (Adm'r, Oct. 8, 1986).

² As a result of the delegation, final PSD permit decisions of the NJDEPE are subject to review under the provisions of 40 C.F.R. § 124.19. See 40 C.F.R. § 124.41; 45 Fed. Reg. 33,413 (May 19, 1980).

³ The permit contains both federal PSD requirements and air pollution control requirements imposed pursuant to New Jersey law.

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On July 7, 1993, after performing a Best Available Control Technology ("BACT") analysis for NO_x ,⁴ NJDEPE issued a modified permit for the facility ("the modified permit"). The modified permit requires the installation of selective non-catalytic reduction (SNCR) to achieve the 95 lbs per hour NO_x emissions limit set in the original permit. As an additional control method for NO_x emissions, the modified permit also requires Ref-Fuel to separate bulk yard wastes from the waste stream entering the incinerator. Modified Permit, Condition J.⁵ Ironbound filed this timely petition for review, challenging the adequacy of NJDEPE's BACT analysis. In particular, Ironbound seeks a more comprehensive evaluation of the viability of separating other nitrogen-containing wastes, in addition to yard waste, at the Essex County facility. NJDEPE and Ref-Fuel oppose the petition. For the reasons stated below, the petition is denied.

I. BACKGROUND

As noted above, Ref-Fuel advised NJDEPE in September 1990 that it would not be able to comply with the NO_x limit set in its original 1985 PSD permit. Stack emissions tests at another Ref-Fuel facility of similar design had indicated that the Essex County facility could not meet the 95 lbs per hour per unit limit using good combustion practices alone. NJDEPE and Ref-Fuel agreed that additional controls would be required to meet the limit and Ref-Fuel proposed installing a selective non-catalytic reduction ("SNCR") system as a means of reducing NO_x emissions to the permitted level. In October 1990, Ref-Fuel submitted a BACT analysis to NJDEPE which contained an analysis of several add-on technologies for controlling NO_x . Ref-Fuel's BACT analysis also included the following discussion on source separating nitrogen-containing wastes as a means of controlling NO_x :

Removing materials that are relatively high in nitrogen content may lower the uncontrolled mass emission rate of NO_x , however, the percent reduction in NO_x emissions from such efforts are difficult to predict and difficult to enforce. *The major nitrogen*

⁴ Because Essex County New Jersey is in attainment for NO_x , NJDEPE was required to limit the Ref-Fuel facility's NO_x emissions based upon the application of BACT. See Clean Air Act § 165(a)(4), 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). BACT is defined in Section 169(3) of the Clean Air Act to be an "emissions limitation based on the maximum degree of reduction of each pollutant subject to regulation" that is "achievable" for the facility after "taking into account energy, environmental and economic impacts and other costs." 42 U.S.C. § 7479(3).

⁵ See text of Condition J *infra* at 6.

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*contributors are textiles * * *, food wastes, yard wastes, and plastics. Due to the putrescible nature of food waste, source separation is not a viable option for this material. However, source separation of yard waste is possible. As shown earlier in Figure 5-1, the seasonal variation of NO_x emissions at the Bristol facility (which does not employ source separation of yard wastes) ranges from about 240 ppm in winter up to 310 ppm in spring and summer. This suggests that an implementable source separation strategy for yard wastes could result in substantial NO_x reductions during spring and summer months. The exact contribution of this type of program or removal of other nitrogen bearing MSW has not been quantified due to a very limited amount of data, * * *.*

BACT Analysis at 5-7 (emphasis added.) Based on the foregoing, Ref-Fuel stated that "[s]ource separation is not considered in this BACT analysis since NO_x emissions reductions cannot be firmly quantified." BACT Analysis at 7-1. Instead, the BACT Analysis concludes that Ref-Fuel's 95 lbs per hour NO_x limit should be met through installation of SNCR. BACT Analysis at 7-57.

On November 30, 1990, Ref-Fuel and NJDEPE entered into an Administrative Consent Order ("ACO") which authorized Ref-Fuel to commence operations under certain specified terms. Under the terms of the ACO, Ref-Fuel agreed (1) to install SNCR to reduce NO_x emissions to the permitted level; and (2) to apply for modification of its 1985 permit.

NJDEPE issued a draft modified PSD permit to Ref-Fuel on April 10, 1992, based on SNCR as BACT for NO_x. NJDEPE held public comment periods on the draft from April 10, 1992, to May 15, 1992, and again from July 10, 1992, to August 21, 1992. In addition, NJDEPE held a public hearing on the draft on August 13, 1992.

NJDEPE received comments from several interested citizens and groups, including Ironbound, seeking, among other things, a revised BACT analysis that includes an evaluation of source separating nitrogen containing wastes as a means

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of limiting NO_x emissions at Ref-Fuel's Essex County facility.⁶ Ironbound, for example, urged NJDEPE to consider the separation of yard wastes, food wastes, textiles and plastics. *See* Ironbound Comments, May 14, 1992, at 11; Letter from Ironbound to NJDEPE (August 20, 1992), at 2.

NJDEPE issued a modified PSD permit on July 7, 1993. The modified PSD permit retains the 95 lbs per hour original NO_x limit and requires installation of SNCR.⁷ In addition, in response to the comments received with respect to source separation,⁸ NJDEPE added a new permit condition, Condition J, which requires Ref-Fuel to:

Monitor incoming waste trucks to determine whether they contain large quantities of easily discernible yard wastes such as grass clippings, leaves, tree trimmings, shrubs and bushes and prevent bulk quantities of these wastes from being charged to the incinerators.⁹

Modified Permit, Condition J. NJDEPE explained in its response to comments on the draft permit that Essex County would be implementing more extensive source separation requirements beyond those identified in Condition J in accordance with a State-approved county-wide source separation program. *See* NJDEPE Response to Comments at 6 and 18.¹⁰

Ironbound filed this petition for review on August 9, 1993, charging that the removal of yard waste from the waste stream, as provided for in Condition J, "is

⁶ NJDEPE had included a source separation requirement for yard wastes to reduce NO_x emissions, in addition to SNCR, in certain earlier working drafts of the permit. However, it did not include the requirement in the draft modified permit issued for public comment. *See* Ironbound Comments, May 14, 1992, Appendices 5 and 6.

⁷ The modified permit imposes an emissions limit on ammonia, an air pollutant released during SNCR, and imposes requirements for ammonia storage. Modified Permit, Condition A.13.

⁸ *See* NJDEPE Response to Comments, August 7, 1993, at 22.

⁹ NJDEPE asserts in its response to Ironbound's petition that source separation alone would not be sufficient to achieve the permit's NO_x limit. There is no evidence in the record to suggest otherwise. *See* NJDEPE Response to Comments, NJDEPE Air Quality Regulation Program Hearing Officer's Report, July 7, 1993, at 19.

¹⁰ NJDEPE directed Essex County to submit to it by September 7, 1993, specific source separation programs and timeframes for implementing them. *See* NJDEPE's Certification of the September 9, 1992 Amendment of the Essex County Solid Waste Management Plan (May 7, 1993). Although Ironbound asserts in its briefs that Essex County did not meet the prescribed deadline, the record does not reflect the current status of its source separation plans.

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insufficient to satisfy BACT for NO_x ." Petition at 8. Ironbound argues that the permit applicant did not adequately analyze waste separation as a control technology for NO_x in its BACT analysis, as required by the Administrator in *In re Brooklyn Navy Yard Resource Recovery Facility*, PSD Appeal No. 88-10 (Adm'r, Feb. 28, 1992). Petition at 7. It asks the Board to direct Ref-Fuel "to complete a thorough, detailed analysis of the reduction in NO_x emissions which would be achieved" if Ref-Fuel were also required to remove food wastes, textiles, plastics, rubber, leather, and other nitrogen-containing wastes from the waste stream. In addition, Ironbound requests that Ref-Fuel "measure the actual emissions reductions" that would be achieved thereby. Petition at 4.

NJDEPE responds that it considered the viability of source separation during the permitting process and that it did not err or abuse its discretion by concluding that a combination of SNCR and source separating yard wastes, as provided for in Condition J, satisfies BACT. NJDEPE Response to Petition at 2. It adds that a determination as to the appropriate extent of waste separation that should be required of a facility must necessarily take local factors into account and therefore is "best left to the discretion of the permitting authority." Response to Petition at 3.

By Order dated October 6, 1993, the Board allowed Ref-Fuel to respond to Ironbound's petition.¹¹ Ref-Fuel argues in its response that Ironbound's petition should be denied on two grounds. First, Ref-Fuel argues that NJDEPE had erroneously required Ref-Fuel to obtain a modified PSD permit in the first instance, and therefore the Board should not review the modified permit. Ref-Fuel bases its argument on 40 C.F.R. § 52.21(i), which provides that existing emissions sources are only subject to PSD review for "major modifications." See 40 C.F.R. § 52.21(j)-(r). A "major modification" is defined at 40 C.F.R. § 52.21(b)(2)(i) as a change "that would result in a significant *net emissions increase* of any pollutant subject to regulation under the Act" (emphasis added). Ref-Fuel maintains that the installation of SNCR is not a "major modification" because it will not increase NO_x emissions, and therefore a permit modification was not required. Second, Ref-Fuel argues, even assuming a permit modification were required, Ironbound has not raised an issue warranting review because source separation was adequately

¹¹ Having elected not to petition for review of the permit decision, Ref-Fuel was not entitled to participate at this stage of the appeal proceeding without the Board's permission. The permittee does not have a right to participate in a permit appeal until *after* review has been granted. See 40 C.F.R. §§ 124.10 and 124.19(c).

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considered in the permitting process. For the reasons set forth below, we conclude that the petition for review must be denied.

II. *DISCUSSION*

Review of a PSD permit determination is not available as a matter of right but at the Board's discretion. 40 C.F.R. § 124.19(a). *See Citizens for Clean Air v. U.S. EPA*, 959 F.2d 839, 845 (9th Cir. 1992). The preamble to the Agency's rules governing permit appeals states that "this power of review should be only sparingly exercised," and that "most permit conditions should be finally determined at the Regional [or State] level * * *." 45 Fed. Reg. 33,412 (May 19, 1980). *See In re SEI Birchwood, Inc.*, PSD Appeal Nos. 93-11 & 93-12, at 2 (EAB, Jan. 27, 1994); *In re Genesee Power Station Limited Partnership*, PSD Appeal Nos. 93-1 through 93-7, at 5-6 (EAB, Oct. 22, 1993); *Ogden Martin Systems, Inc. of Onondaga, Inc., et al*, PSD Appeal No. 92-7, at 2 (EAB, Dec. 1, 1992). The burden of demonstrating entitlement to review is on the petitioner. *Id.* Here, given NJDEPE's inclusion of a source separation requirement for yard wastes in the modified permit, Ironbound has the burden of showing that NJDEPE's decision not to require source separation of other nitrogen-containing wastes was clearly erroneous. The Board concludes that Ironbound has failed to meet its burden.

A. *The Need for a Modified Permit*

Before analyzing Ironbound's contentions, we turn to Ref-Fuel's argument that Board review is not appropriate here because a permit modification was not required. This issue has not been preserved for review and, therefore, it is not properly before the Board in this case. The Part 124 rules provide in pertinent part that administrative review is limited to issues raised in a petition for review. 40 C.F.R. § 24.19(a). The petition must contain a demonstration that all reasonably ascertainable issues raised therein were first raised during the public comment period. 40 C.F.R. §§ 124.13 and 124.19.¹² *See also Ogden Martin Systems of Onondaga, Inc., supra*, at 3 n.4; *Union County Resource Recovery Facility*, PSD

¹² In particular, 40 C.F.R. § 124.13 provides that:

[A]pplicants[] who believe * * * [t]he tentative decision to * * * prepare a draft permit is inappropriate, must raise all reasonably ascertainable issues and submit all reasonably available arguments supporting their position by the close of the public comment period.

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Appeal No. 90-1 (Adm'r, Nov. 28, 1991). The Administrator explained the rationale for these requirements in the *Union County* decision, stating that:

[T]he purpose of these regulations is to ensure that all matters are first raised with the permit issuer. In this manner, the permit issuer can make timely and appropriate adjustments to the permit determination, or, if no adjustments are made, the permit issuer can include an explanation of why none are necessary.

In re Union County Resource Recovery Facility, supra, at 2-3. See also *In re Atochem North America, Inc.*, RCRA Appeal No. 90-23, at 2-3 (Adm'r, Jan. 28, 1991).

Here, Ref-Fuel did not raise the issue of the need for a permit modification during the comment period,¹³ nor did Ref-Fuel file a petition for review. In such circumstances, any objections Ref-Fuel may have had to the issuance of the modified PSD permit have been waived.¹⁴ Therefore, the Board will not review NJDEPE's decision to require a permit modification in this case.¹⁵

B. The BACT Determination.

¹³ NJDEPE's Response to Comments does not identify this issue as having been raised during the comment period, and Ref-Fuel makes no demonstration to the contrary. See 40 C.F.R. § 124.17(a)(2). Cf. *In re Pennzoil Exploration and Production Co.*, UIC Appeal No. 88-1, at 3 (Adm'r, Nov. 16, 1990). Ref-Fuel's informal objections to the issuance of the modified permit *prior* to the comment period (see Letters from Ref-Fuel to NJDEPE dated February 1, 1991, June 24, 1991, and October 4, 1991), did not preserve the issue for review. *In re Shell Oil Co.*, RCRA Appeal No. 88-48, at 4 n.2 (Adm'r, Mar. 12, 1990).

¹⁴ See *In re Adcom Wire, d/b/a Adcom Wire Company*, RCRA Appeal No. 92-2, at 6 n.4 (EAB, Feb. 4, 1994) (Order on Reconsideration) in which the Board stated that it will entertain challenges to the jurisdictional decision underlying a federally-issued RCRA permit "where the issue has been properly presented to the Region and preserved for the Board's review."

¹⁵ We recognize that under this construction of the rules, permittees whose sole objection to a permit is that one was not required (*i.e.*, they do not object to the actual permit conditions and are willing to accept the permit as issued even though they believe it is unnecessary) will be required to raise that objection during the public comment period and to file a protective notice of appeal in order to preserve the opportunity to contest issuance of the permit in the event that the permit conditions are challenged by others on appeal. We would expect that the permittee would withdraw the appeal in the event that no other appeal is filed and the permittee remains willing to live by the permit terms. Obviously, should the permittee wish to contest issuance of the permit, it would have to pursue the appeal.

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Ironbound has not shown that NJDEPE erred in its BACT determination for NO_x. Therefore, review is not warranted. Ironbound maintains that the BACT analysis for the modified permit did not include an adequate evaluation of source separation as a control option for NO_x, as required by *In re Brooklyn Navy Yard, supra*. Petition at 4-5. However, Ironbound's argument is based on the erroneous assumption that the *Brooklyn Navy Yard* decision requires that a BACT analysis include consideration of every nitrogen-containing element in a waste stream. It does not.

In the *Brooklyn Navy Yard* decision, the Administrator remanded a PSD permit determination because the permit issuer had given *no* consideration to source separation as a viable control option for NO_x, and directed the permit issuer to ascertain the viability of source separating "readily discernible components of the waste stream that contain nitrogen." *Id.* at 16. The Board subsequently emphasized in *Ogden Martin Systems of Onondaga, Inc., supra*, at 7-8, that:

EPA did not hold in *In re Brooklyn Navy Yard* that an adequate BACT analysis for NO_x must address the potential for materials separation of *every* nitrogen-containing element of a waste stream, nor did the Agency identify particular components of a waste stream that must be examined as part of such an analysis. Rather, the Agency held that * * * the permitting authority is required to take into account "energy, environmental and economic impacts and other costs" in determining the maximum achievable reduction in emissions for a facility, adding that some wastes are "more susceptible than others to cost-effective separation from the waste stream prior to incineration." *Id.* The decision emphasizes that "there need not be a consideration of every detail of every conceivable separation and collection program for every individual nitrogen-containing component of the waste stream for the BACT analysis requirements to be satisfied." *Id.* Thus, utilizing the approach described in the *Brooklyn Navy Yard* decision, permit applicants must first identify those elements of the waste stream that contribute materially to NO_x emissions and then determine whether removal of those elements from the waste stream is practicable, taking into account the statutorily prescribed considerations.

In *Ogden Martin*, as in the case presently before the Board, interested citizens challenged a PSD permit that required the permittee to use SNCR coupled with

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source separation of yard wastes to control NO_x. Petitioners argued that the permit's source separation requirements should be extended to include food wastes and rubber. The Board denied their petition, holding that they had failed to show "that the combination of materials separation and control technologies prescribed by the permit are inadequate to satisfy the statutory criteria for BACT." *Ogden Martin* at 10.

The rationale of the *Ogden Martin* decision applies here. Based on an administrative record that includes written comments and oral testimony on the draft permit,¹⁶ several reports on source separation, and the 51 page Final Report of New Jersey's Emergency Solid Waste Assessment Task Force (August 6, 1990),¹⁷ NJDEPE determined that only source separation of yard wastes would be practicable for the Essex County facility and that source separating other nitrogen-containing wastes should be implemented as part of a county program. NJDEPE Response to Petition at 2. *See* NJDEPE Response to Comments at 6-8.

Ironbound does not contend nor is there any evidence that NJDEPE did not give full consideration to all of the information that had been submitted on this issue. Nor has Ironbound convinced us that the administrative record before NJDEPE did not contain adequate information upon which it could base a decision. Indeed, given NJDEPE's addition of Condition J to the final permit, there can be no doubt that it took the source separation information available in the record into account when it determined BACT for NO_x.

Therefore, to demonstrate that the permit issuer's judgment was erroneous, Ironbound must demonstrate that source separation of additional categories of wastes would be practicable for Ref-Fuel's Essex County facility (taking into account the statutorily prescribed considerations) and would contribute materially to reduction of NO_x emissions. Ironbound has not made such a demonstration. Ironbound "merely repeats the comments it made on the draft permit without explaining how or why [the permit issuer's] responses to the comments are inadequate, and thereby fails to comply with the requirements of 40 C.F.R. §

¹⁶ *See* Comments and Appendices Filed on Behalf of Ironbound, May 14, 1992. Ironbound's submission includes a fifteen-page letter and more than 125 pages of excerpts from various reports on waste management practices.

¹⁷ *See* Ironbound Comments, May 14, 1992, Appendix 15.

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124.19." *In the Matter of Hadson Power 14-Buena Vista*, PSD Appeal Nos. 92-3, 92-4 and 92-5, at 46 n.59 (EAB, Oct. 5, 1992).¹⁸

It is not enough for a petitioner to rely on previous statements of its objections, such as comments on a draft permit; a petitioner must demonstrate why the Region's response to those objections (the Region's basis for its decision) is clearly erroneous or otherwise warrants review.

In re Adcom Wire, d/b/a Adcom Wire Company, RCRA Appeal No. 92-2, at 10 (EAB, Sept. 3, 1992), cited with approval in *In re Genessee Power Station Limited Partnership*, *supra*, at 4.

Ironbound argues that the present case is distinguishable from *Ogden Martin* because the *permittee* in that case had produced a substantial record on NO_x source separation in connection with its permit application, whereas Ref-Fuel did not study source separation in the same detail. This argument lacks merit. The issue before the Board in a permit appeal is whether *the permit issuer* erred in the exercise of its authority. While the permit applicant has a responsibility to provide information on the control alternatives that can be used to achieve BACT, "regardless of the control level proposed by the applicant as BACT, * * * the ultimate BACT decision is made by the permit issuing agency * * *." ¹⁹ Therefore, given that NJDEPE had the benefit of sufficient information on the subject, clearly considered source separation, and made a BACT determination that is consistent with the administrative record, its determination is not flawed in this case merely because the permit applicant did not fully evaluate the benefits of separating out the various nitrogen-containing elements of the waste stream.

III. CONCLUSION

¹⁸ For example, Ironbound does not address Ref-Fuel's contention that source separation of food waste is not viable for its Essex County facility (*see supra* at 3). Nor does Ironbound take into account that food wastes constitute only 4% of the State's waste stream. *See* Final Report, New Jersey's Solid Waste Management Task Force (Aug. 6, 1990), Table 1.

¹⁹ "Top-Down Best Available Control Technology Guidance Document," March 15, 1990, at 55. *See also* New Source Review Workshop Manual, October 1990 (Draft). While these two documents do not have the force of regulations, they have been looked to by the Board in construing BACT. *See e.g., In re Inter-Power of New York, Inc.*, PSD Appeal Nos. 92-8 and 92-9, at 6 n.8 (EAB, Mar. 16, 1994).

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Ironbound has failed to identify a clear error in NJDEPE's BACT determination, and therefore review of the petition is denied.

So ordered.